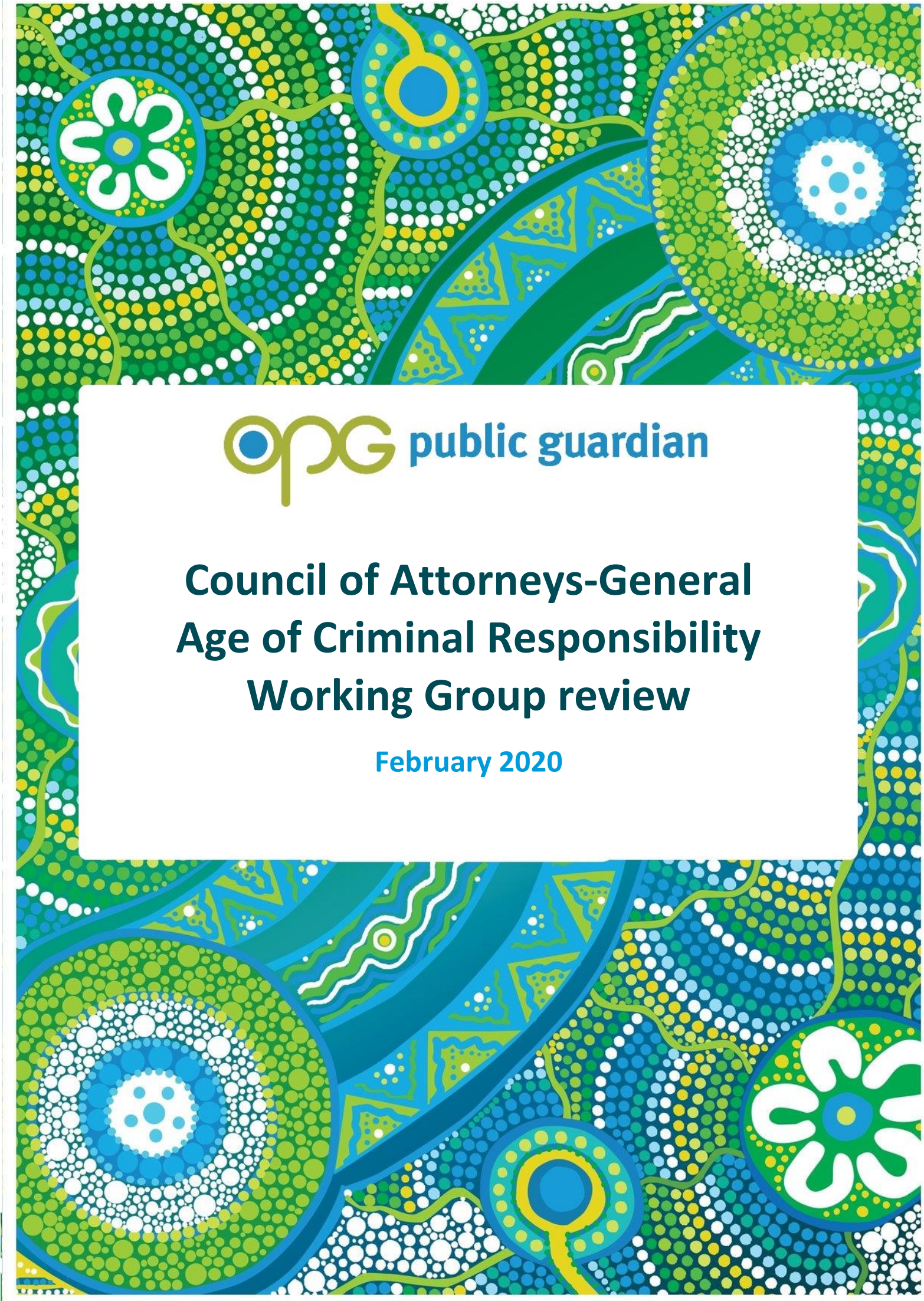

public guardian

Council of Attorneys-General Age of Criminal Responsibility Working Group review

February 2020

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of children and young people in out-of-home care or staying at a visitable site, and adults with impaired decision-making capacity. The purpose of OPG is to advocate for the human rights of our clients.

OPG provides individual advocacy to children and young people through the following two functions:

- the child community visiting and advocacy function, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities), and
- the child legal advocacy function, which offers person-centred and legal advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them.

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving National Disability Insurance Scheme (NDIS) supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

OPG's role in the youth justice system

While there are several levels of oversight of the youth justice system in Queensland, OPG is the only oversight body that *represents the voice of the child*, and individually advocates for children in detention. We therefore have frequent, direct and ongoing access to the child. A primary focus of OPG is on building relationships with children in the youth justice system, noting that these relationships may have been established before the child's entry into detention, or maintained after their release if the child is in out-of-home care or staying at another visitable site.

OPG's community visitors visit children in detention, independently monitor their safety and wellbeing and advocate for their interests with service providers and agencies in the child protection and youth justice systems. Community visitors ensure these children are receiving appropriate care through weekly visits to detention centres located in Wacol and Townsville, and regular visits to Supported Community Accommodation (SCA). OPG's community visitors have powers to enter youth detention centres without notice, inspect the site, and require staff members to answer questions and produce documents.

OPG's child advocates, who are employed as legal officers (CALOs), advocate for children subject to a range of child protection interventions. They do so by assisting youth justice lawyers through information sharing and advocating for placement and service support options to assist children in relation to bail applications and post release from youth detention. CALOs also provide participation advocacy for children to support them to voice their views and concerns in relation to suspensions and exclusions in educational settings and decisions made by the Department of Child Safety and tribunal and court processes.

Since mid-2018, OPG's CALOs have provided targeted advocacy to ensure issues regarding the child's capacity for criminal responsibility (*doli incapax*) are appropriately explored in court proceedings. This involves supporting instructed legal representatives to canvass submissions in court proceedings to ensure Police Prosecutions is put to proof on the issue, and to bring the court's attention to considerations that may be relevant to the question of capacity for criminal responsibility including those factors considered above.

Submission to the review

Position of the Public Guardian

OPG welcomes the opportunity to provide a submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group's consultation paper, *Review of age of criminal responsibility*. The views contained in this submission are that of OPG and do not purport to represent the views of the Queensland Government.

This submission addresses the issues and questions raised in the consultation paper where they relate to the experiences of OPG and the people that we serve.

OPG would be pleased to lend any additional support as the review progresses. Should clarification be required regarding any of the issues raised, OPG would be happy to make representatives available for further discussions.

The Public Guardian recommends:

1. The minimum age of criminal responsibility should be increased to 14 years of age for all offences.
2. If the age of criminal responsibility is increased to an age less than 14 years, or increased only in certain circumstances, the presumption of *doli incapax* should be retained to ensure there is a mechanism to protect the rights and interests of children, particularly those in out-of-home care, where there is a question about capacity for criminal responsibility.
3. The *doli incapax* could be applied more effectively in practice if:
    - a child's functionality in day to day life, historical and current circumstances and vulnerabilities was considered more acutely rather than simply considering their actions in isolation,
    - a more functional and timely case management process was implemented, and
    - targeted training and accreditation processes and clear practice direction regarding procedural requirements for court proceedings were in place.
4. Children under 14 should not be placed in detention and no child under the age of 18 should be held in any adult facility.
5. Crime prevention programs and frameworks for children must include developmentally and culturally appropriate trauma informed proactive education, early intervention and responses aimed at mitigating a child's adverse childhood experiences.
6. Youth diversion programs in remote communities must be developed and operated by, or in partnership with, Aboriginal and Torres Strait Islander communities and/or Aboriginal and Torres Strait Islander controlled organisations.
7. Government investment in preventative programs and frameworks for children exhibiting anti-social or criminal behaviours who are no longer able to access youth justice services.

8. Targeted, culturally appropriate strategies to address overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system.
9. A change to the minimum age of criminal responsibility to include consideration of:
    - the criminalisation of disability,
    - the criminalisation of trauma, and
    - the criminalisation of children in care.

Responses

1. Currently across Australia, the age of criminal responsibility is 10 years of age. Should the age of criminal responsibility be maintained, increased, or increased in certain circumstances only? Please explain the reasons for your view and, if available, provide any supporting evidence.

OPG believes it to be imperative that the age of criminal responsibility be increased.

There is a growing body of research to indicate that adolescents are undergoing significant brain growth and development, affecting a number of areas of cognitive functioning "including impulsivity, reasoning and consequential thinking".[1] It is therefore not unreasonable to conclude that a child's brain at age 10 is not sufficiently developed to form the necessary intent for full criminal responsibility.

This is particularly the case for children in the child protection system who are further disadvantaged by traumatic environmental factors related to their upbringing. Recent research published in *Australian Institute of Criminology – Trends and Issues in Crime and Criminal Justice*[2], found that children who come to the attention of statutory child protection services are at least nine (9) times more likely than other children to offend and come under the supervision of youth justice services. The research also found that generally more than half (>50%) of the children detained in youth justice centres are known to child protection services.

Most children in the child protection system have a multitude of adverse childhood and pre-birth experiences. The violence, abuse, homelessness, and drug or alcohol misuse they have been exposed to from such a tender age further delays their brain development, predisposing them to engage in offending behaviour. A study released by Australian Institute of Health and Welfare (AIHW*),* cited studies revealing that fetal alcohol spectrum disorder (FASD), a condition seen amongst children in the child protection system, is difficult to diagnose and often not diagnosed correctly. AIHW also reported that:

[1] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) quoting Nicholas Lennings and Chris Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli incapax:* A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.
[2] Susan Baidawi and Rosemary Sheehan, 'Crossover kids: Offending by child protection-involved youth'. (2019) Australian Institute of Criminology - Trends and Issues in Crime and Criminal Justice

> *"Children with FASD have significant deficiencies with social skills and empathy, such as understanding what another person feels or believes correctly. These difficulties often lead to disrupted education; unemployment; substance misuse; homelessness; mental health problems; early and repeated engagement with the law; problems adhering to conditions of community-based orders; increased risk of entering detention; and poor or easily misinterpreted behaviour while in detention."*[3]

Criminalising the trauma and behavioural manifestations of these children as young as 10 creates a vicious cycle of disadvantage and only further isolates and victimises the children most in need of the community's support and protection. Such early contact with the criminal justice system also increases the chances of re-incarceration, leading to an almost inevitable progression to the adult corrections system. In fact, the Australian Institute of Health and Welfare (AIHW) identified that children and young people who were first subject to supervision under the youth justice system due to offending at 10 to 14 years old were more likely to experience all types of supervision in their later teens (33% compared to 8% for those first supervised at older ages). This has negative consequences not only for the child but the broader community.

OPG encourages the Working Group to refer to the AIHW study, *Young people in child protection and under youth justice supervision - 1 July 2014 to 30 June 2018*, for a detailed examination of the trauma experienced by children in the child protection system which reduces their ability and opportunities to learn and develop empathy. This can then be a pre-cursor to engaging in anti-social or criminal behaviour and early exposure to the youth justice system.

Children with a cognitive or intellectual disability are also a vulnerable cohort whose behaviour can lead to early exposure to the criminal justice system. These children may exhibit behaviours of concern for a number of reasons, particularly if their needs are not being met by the people or the service systems on which they rely. There is a risk that these behaviours are attributed with criminal intent and the child is prosecuted by the criminal justice system, rather than supported by other appropriate service systems. Again, this interaction with the justice system by a 10 year old child with complex needs can do lasting damage to their development.

Beyond offending itself, it is also the experience of OPG that young children lack the capacity to properly engage in the criminal justice system, resulting in a propensity to accept a plea bargain, give false confessions or fail to keep track of court proceedings, or to properly comprehend criminal proceedings.

OPG submits that the age of criminal responsibility should be raised for all types of offences. This is consistent with the findings of the *Royal Commission into the Protection and Detention of Children in the Northern Territory*. From OPG's observations, a child's lack of ability to reason, predict consequences, control impulses, and comprehend criminal proceedings impacts on all behaviours they exhibit, be that of a minor or more serious criminal nature.

[3] AIHW, *National data on the health of justice-involved young people: a feasibility study 2016–17,* pp.5-6

2. If you consider that the age of criminal responsibility should be increased from 10 years of age, what age do you consider it should be raised to (for example to 12 or higher)? Should the age be raised for all types of offences? Please explain the reasons for your view and, if available, provide any supporting evidence.

OPG has consistently advocated for an increase to the age of criminal responsibility to 14 years of age. This aligns with the United Nations Convention on the Rights of the Child (General comment: no.24 (2019) on children's rights in the child justice system), which encourages state parties, including Australia, to raise their minimum age of criminal responsibility to at least 14 years. It should be alarming for law makers that Australia's current age of criminal responsibility is so far below the UN's minimum standard and in fact represents a significant breach of the human rights of Australian children.

Australia's inconsistency of laws regarding a child's legal competency is highly concerning. In the criminal justice system a child as young as 10 is held criminally responsible for all their actions, determined by their ability to form criminal intent and to understand right from wrong. Yet, at the same time, that same child is considered too young to understand and make their own health decisions, too young to provide consent to seek psychological support, too young to have their opinion honoured in family court, too young to be taken seriously in civil proceedings.

Only two states have legislated to ensure young people can make their own decisions/provide their own consent in relation to health care. In NSW, section 49 of the *Minors (Property* and *Contracts) Act 1970* states: *Where medical treatment or dental treatment of a minor aged fourteen years or upwards is carried out with the prior consent of the minor, his or her consent has effect in relation to a claim by him or her for assault or battery in respect of anything done in the course of that treatment as if, at the time when the consent is given, he or she were aged twenty-one years or upwards.*

South Australia' *Consent to Medical Treatment and Palliative Care Act 1995*, states that a child over 16 years can consent to medical treatment only if the medical practitioner administering the treatment is of the opinion the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and well-being and that this opinion is supported in writing by at least one other medical practitioner who has examined the child. The opinion of two medical professionals is required for a child aged 16 years to 18 years to consent to their own health care, and yet, by 16 years of age, they could have already been in the criminal justice system, held accountable for their actions, for 6 years.

If there are significant questions about the ability of a child over 16 years of age to weigh up the nature, consequences an risks of health treatment for themselves regarding their own body when explained to them personally in great detail by the health professional, it is absurd to think that 6 years earlier they were able to weigh up the nature, consequences and risks of undertaking an action considered criminal, with nobody advising them, whilst acting on impulse and emotion usually arising from a traumatic experience or care needs.

The minimum age of criminal responsibility beginning at 14 years of age is consistent with the United Nations Convention on the Rights of the Child, the aforementioned NSW legislation, the principles of Gillick Competence *(Gillick v West Norfolk and Wisbech Area Health Authority[1986] AC 112)* as adopted by the High Court in Australia in a case known as 'Marion's case' *(Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992)175 CLR 218*) and concurs with well-known psychological models regarding child and adolescent development.

OPG submits that the age of criminal responsibility should be raised to 14 years for all types of offences. If the decision is made to make a distinction between categories of offences, we defer to more experienced bodies to assess the types of offences an increase to the age of criminal responsibility should apply to.

Recommendation 1:

The minimum age of criminal responsibility should be increased to 14 years of age for all types of offences.

3. If the age of criminal responsibility is increased (or increased in certain circumstances) should the presumption of doli incapax (that children aged under 14 years are criminally incapable unless the prosecution proves otherwise) be retained?

OPG submits that, if the age of criminal responsibility is increased to an age less than 14 years, or increased only in certain circumstances, the presumption of *doli incapax* should be retained. If the presumption is removed, OPG is concerned about the disproportionate impact it could have on the rights and interests of children in out-of-home care.

The *doli incapax* principle can protect children from disadvantaged backgrounds, including those in out-of-home care, by directing attention to the child's education and the environment in which the child has been raised, as opposed to their biological age acting as the sole determinant of capacity. A meaningful assessment of a child's capacity must take into account any relevant trauma and disadvantage during their childhood and the physical, intellectual and psychological consequences they may have suffered. This has added significance in the context of children charged with criminal offences who have also been placed in the child protection system. At a minimum, the position of such children highlights their vulnerability through current or previous exposure to abuse or harm or through the absence of protective factors. Their current living circumstances and the reality of conditions in the out of home care system are also relevant factors, which may include placement instability, disrupted attachments with parents and caregivers and poor educational outcomes and attendance. A child's capacity, by virtue of any previous experience of trauma, maltreatment or other harm, may also be compounded by their everyday reality in the out-of-home care system which may exacerbate a child's psychological and emotional vulnerabilities caused by previous maltreatment.

In this context, a child exhibiting aggressive or challenging behaviours should be seen for what it is: the expression of distress or maladapted responses to adversity as a function of a lack of capacity, rather than criminal conduct. By reason of their significant trauma experiences and heightened vulnerabilities, children in the out-of-home care system should be entitled to the protection of legal principles that recognise their behaviours as a function of impaired cognitive

capacity rather than criminal conduct, including the *doli incapax* principle. This will ensure they are diverted away from the criminal justice system to more appropriate functional supports.

Case example

OPG provided complementary advocacy for a 10 year old who was charged with a number of criminal offences related to their behaviour in a residential care setting, including property damage. OPG held concerns that the child's significant trauma background and circumstances as a child in the child protection system significantly impaired the child's adaptive and coping skills and cognitive functioning. OPG was also concerned that the child's expression of distress or maladapted responses to adversity in these circumstances should be understood as a function of impaired cognitive capacity, rather than criminal conduct. OPG supported the instructed legal representative to provide submissions to the court and put Police Prosecutions to proof on the issue of capacity for criminal responsibility (s29(2) *Criminal Code*), which ultimately resulted in Police Prosecutions withdrawing all charges.

As a result of OPG advocacy, other supports were also put in place to address the underlying factors that had contributed to the child's behaviours. To OPG's knowledge, the child has not been charged since.

4. *Does the operation of doli incapax differ across jurisdictions and, if so, how might this affect prosecutions?*

As a Queensland statutory body, OPG is not best placed to comment on jurisdictional differences in the operation of *doli incapax*. However, the following information is provided on the interpretation of the principle in Queensland to inform the review.

In Queensland, the *doli incapax* principle is found in section 29(2) of the *Criminal Code*, which provides that a person between the ages of 10 and 14 years "is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission". The section places a different emphasis to that historically developed by the common law doctrine of *doli incapax*, which focused on the *knowledge* of the child at the time of the act rather than their *capacity* to know at the time of the act.[4] The Court of Appeal in Queensland made clear the distinction in *R v B*, where it was observed that "it must be proved that at the relevant time 'the person has *capacity* … to know that the person ought not to do the act'. This is, of course, different from proving actual knowledge…"[5]

5. *Could the principle of doli incapax be applied more effectively in practice? Please explain the reasons for your view and, if available, provide any supporting evidence.*

It is the experience of OPG that *doli incapax* could be applied more effectively in practice if a child's functionality in day to day life, historical and current circumstances and vulnerabilities were considered more acutely rather than simply considering their actions in isolation. This

[4] *RP v The Queen* (2016) 259 CLR 641 at [9].
[5] *R v B* [1997] QCA 486.

should also include an examination of further prejudicial factors such as previously noted and other compromising factors (such as neuropsychological issues, experiences in the child protection system and any mental health conditions).

OPG is aware of recent research that suggests that *doli incapax* provisions are perhaps not being implemented as intended.[6] This is supported by findings from the recent study through the Australian Institute of Criminology,[7] which indicated that despite 41% of 'crossover children' (children who are subject to both care orders and justice orders) and in the study acquiring their first police charges prior to the age of 14, only 2% had been assessed as *doli incapax.* While OPG is not aware of statistics on this issue in Queensland, anecdotally *doli incapax* is not commonly tested in court proceedings.

This may be a result of various factors. It is clear that the question and presumption of a child's capacity is a complex and multifaceted inquiry, which requires a commensurately nuanced body of evidence to rebut beyond reasonable doubt. The complexity of this issue, limited practice guidance and training for stakeholders, and limited guidance in the form of court practice directions or other supporting material to address procedural issues may contribute to this principle rarely being addressed in court proceedings.

Another significant issue hindering the effectiveness of *doli incapax* is the timeliness of decision making and the need for a more functional and timely case management process. From OPG's experience, in practice, to address issues regarding capacity for criminal responsibility, the court will require a brief of evidence from Police Prosecutions canvassing evidence to be relied on to rebut the presumption, which then must be tested in court proceedings. The delay may result in bail issues for some children, being held on remand for an extended period pending determination of issues regarding criminal responsibility. As a result, a child may instruct a lawyer to be "pleaded out" to finalise matters promptly, meaning the issue of capacity for criminal responsibility is left untested.

Further, the principle of *doli incapax* may be applied more effectively in practice if stakeholders are better informed about the relevant principles (including evidentiary requirements) and court processes, which may be facilitated by targeted training and accreditation processes and clear practice direction regarding procedural requirements for court proceedings. Streamlining prosecution procedures including the timely provision of briefs of evidence regarding capacity for criminal responsibility may also assist, provided prosecutions are adequately funded and resourced to do so.

Ultimately, for reasons noted above including timeliness of decision making and consequences relating to bail and remand periods, the *doli incapax* principle is not the most appropriate means for protecting the rights and interests of children in the youth justice system, especially those also in care. Instead, the age of criminal responsibility should be raised. However, in the event that it is not raised to the age of 14, the *doli incapax* principle should be retained to ensure there an avenue (albeit an inadequate one) to protect the rights and interests of children,

[6] Fitz-Gibbon & O'Brien, 'A child's capacity to commit crime: examining the operation of *doli incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18.
[7] Baidawi & Sheehan, ''Crossover kids': Offending by child protection-involved youth' (2019).

particularly those in out-of-home care, where there is a question about capacity for criminal responsibility.

Recommendation 2:

If the age of criminal responsibility is increased to an age less than 14 years, or increased only in certain circumstances, the presumption of *doli incapax* should be retained to provide a mechanism to protect the rights and interests of children, particularly those in out-of-home care, where there is a question about capacity for criminal responsibility.

Recommendation 3:

The *doli incapax* could be applied more effectively in practice if:

- a child's functionality in day to day life, historical and current circumstances and vulnerabilities was considered more acutely rather than simply considering their actions in isolation.
- a more functional and timely case management process were in place.
- targeted training and accreditation processes and clear practice direction regarding procedural requirements for court proceedings were in place.

6. Should there be a separate minimum age of detention? If the minimum age of criminal responsibility is raised (eg to 12) should a higher minimum age of detention be introduced (eg to 14)? Please explain the reasons for your views and, if available, provide any supporting evidence.

OPG is adamant that children under 14 should not be placed in detention and no child under the age of 18 should be held in any adult facility. As cited above, the AIHW has identified that children who were first subject to supervision under the youth justice system due to offending at 10 to 14 years old were more likely to experience supervision in their later teens.

We also refer to the *Royal Commission report into the Protection and Detention of Children in the Northern Territory*. Notably, recommendation 27.1 of this report proposes that youth under the age of 14 not be ordered to serve a time of detention unless strict criteria is met relating to the seriousness of the offence and the risk presented to the community.

Recommendation 4:

Children under 14 should not be placed in detention and no child under the age of 18 should be held in any adult facility.

7. What programs and frameworks (eg social diversion and preventative strategies) may be required if the age of criminal responsibility is raised? What agencies or organisations should be involved in their delivery? Please explain the reasons for your views and, if available, provide any supporting evidence.

OPG considers that a child's entry into the criminal justice system provides a valuable opportunity to engage with families and offer early intervention and crime preventative social

services, as proposed in the *Atkinson report*. Depending on the individual circumstances of the child, these methods or supports could include parenting programs, access to targeted social services, mental health services, drug and alcohol services and educational supports that focus on both physiological and brain-based behaviour regulation. This intervention point could aid in identifying children who have an undiagnosed disability or cognitive impairment, those disengaged from educational settings, or more generally those who may not have had access to the interventions needed to adequately and effectively support them and their family. Any preventative programs and frameworks must include developmentally and culturally appropriate trauma informed proactive education, early intervention and responses that are aimed at mitigating a child's adverse childhood experiences.

We again draw attention to the *Royal Commission report into the Protection and Detention of Children in the Northern Territory* to inform the development of social diversion and preventative strategies should the age of criminal responsibility be increased. The matters raised in Volumes 3A and 3B of the Royal Commission's report explore a range of issues, including the outcomes of comprehensive research undertaken. OPG urges consideration of the recommendations as they may be applied to Queensland, including the need for youth diversion programs in remote communities to be developed and operated in partnership with, or by, Aboriginal and Torres Strait Islander communities and/or Aboriginal and Torres Strait Islander controlled organisations (recommendation 18.1).

8. Are there current programs or approaches that you consider effective in supporting young people under the age of 10 years, or young people over that age who are not charged by police who may be engaging in anti-social or potentially criminal behaviour or are at risk of entering the criminal justice system in the future? Do these approaches include mechanisms to ensure that children take responsibility for their actions? Please explain the reasons for your views and, if available, provide any supporting evidence or suggestions in regard to any perceived shortcomings.

The Queensland Family and Child Commission report (QFCC report) details a number of programs designed to address anti-social or potentially criminal behaviour and those at risk of entering the criminal justice system in the future, including the youth and family support service offered in Queensland. The QFCC report also discusses (page 32) the youth justice diversionary strategies in New Zealand whereby criminal proceedings are deemed to be a last resort, with the vast majority of youth offending handled by the police through issuing cautions, initiating alternative action plans or holding family group conferences. In New Zealand, youth justice conferences must be held before matters are referred to Youth Court.

OPG also recommends consideration be given to the strategies discussed in the report prepared by Toni Craig for the Winston Churchill Memorial Trust of Australia, *Strategies to improve outcomes for children at risk of offending*. The report includes a detailed analysis of innovative ways in which youth crime is addressed in world-leading countries. The report noted Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) as having an enviable record with respect to low rates of youth offending and youth incarceration. In particular, Norway was mentioned as a country with high quality innovative responses to youth and adult crime.

As mentioned above, a significant proportion of children end up in the justice system as a result of care issues and trauma backgrounds. For any program to be successful in reducing the anti-social or criminal behaviour of these young and vulnerable people, significant focus must be on adequately addressing the care needs, trauma and psychological support each child requires.

9. If the age of criminal responsibility is raised, what strategies may be required for children who fall below the higher age threshold and who may then no longer access services through the youth justice system? Please explain the reasons for your views and, if available, provide any supporting evidence.

It would be a terrible stain on modern Australian society if necessary supports and services were only available to children who enter and remain within the youth justice system.

OPG recommends that the same approach be adopted for children who currently would fall under the criminal age of responsibility and engage in anti-social and criminal behaviour. Strategies could incorporate parenting programs, access to targeted social services, mental health and disability assessment and services, drug and alcohol services and educational supports that focus on both physiological and brain-based behaviour regulation. This would, of course, require government investment in such programs outside of the youth justice system. However, it is an investment that could reduce the need for such programs if children have the tools, resources and support necessary to not engage in criminal activity in the first place. The flow on effects to both the child, their family and the community as a whole would be significant.

In considering diversion and preventative strategies for children who fall under the age of responsibility to avoid entry into the youth justice system, the overrepresentation of Aboriginal and Torres Strait Islander children must be addressed. Targeted strategies are urgently required, including cultural competency training across the sector.

10. If the age of criminal responsibility is raised, what might be the best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold?

True protection of the community from criminal behaviours relies on the community recognising the value of investment in early interventions that promote children's development, psychological health, education, physical health and overall wellbeing and prevent them from engaging in offending behaviour from the outset.

Recommendation 5:

Crime prevention programs and frameworks for children must include developmentally and culturally appropriate trauma informed proactive education, early intervention and social services responses aimed at mitigating a child's adverse childhood experiences.

Recommendation 6:

Youth diversion programs in remote communities must be developed and operated by, or in partnership with, Aboriginal communities and/or Aboriginal controlled organisations.

Recommendation 7:

Government investment in preventative programs and frameworks for children exhibiting anti-social or criminal behaviours who are no longer able to access youth justice services.

Recommendation 8:

Targeted, culturally appropriate strategies to address overrepresentation of Aboriginal and Torres Strait Islander children in the youth justice system.

11. Is there a need for any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered doli incapax) to participate in activities or behaviours which may otherwise attract a criminal offence?

OPG supports any measures that will protect children from early exposure to the criminal justice system. However, this matter is outside of OPG's functions to provide informed comment on.

12. Are there issues specific to states or territories (eg operational issues) that are relevant to considerations of raising the age of criminal responsibility? Please explain the reasons for your views and, if available, provide any supporting evidence.

OPG is not aware of any specific operational issues for consideration.

13. Are there any additional matters you wish to raise? Please explain the reasons for your views and, if available, provide any supporting evidence.

Current age of criminal responsibility may criminalise and exacerbate disability

An issue OPG finds gravely concerning regarding the current age of criminal responsibility is the serious risk of the criminalisation of child neurodevelopmental disorders. We strongly recommend that this issue is prioritised in assessing the age at which a child should be deemed to be criminally responsible for their actions. A study conducted in the Banksia Hill Detention Centre in Western Australia, *Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia*, showed enormously high rates of undiagnosed, cognitive disability in youth detention centres. This necessarily raises the question of whether these children are fit to plead, and definitely highlights the inappropriateness of the detention centre environment. OPG submits that this is particularly underscored for children with autism or foetal alcohol spectrum disorder. For example, it may

cause heightened distress to a child with autism, where accentuated behaviours of distress may then be further punished by the system.

Once in detention, children with cognitive disability are highly vulnerable to abuse and exploitation by others, including staff and other children. The detention environment is not appropriate or adequate to support these children or meet their needs where all other service systems have failed.

Children with neurodevelopmental disorders (often without any formal diagnosis) in detention have often experienced multiple system failures to identify and appropriately respond to their needs before their situation reaches crisis point; this includes failures in the health, education, child protection and justice systems to identify the child's needs and intervene before the child enters detention.

It is critical that instead of criminalising children as young as 10, early intervention and stronger collaboration between service systems be employed to identify and appropriately respond to the needs of children with cognitive or intellectual disability, before their behaviour escalates to the point that there is a risk of criminal behaviour.

Current practices may criminalise and exacerbate trauma

OPG is also aware of the chronic criminalisation of trauma in the youth justice system. The behaviours of children that lead to incarceration are often a manifestation of childhood abuse and neglect. The detention environment is inappropriate, inadequate and ill-equipped to appropriately respond to this trauma, and in fact may often exacerbate or retrigger the trauma for the child, leading to escalating behaviours of concern and re-traumatisation.

As noted above in relation to children with disability, the review should prioritise early intervention and stronger collaboration between service systems to appropriately address childhood trauma, long before the child is at crisis point and at risk of entering detention.

Criminalisation of children in care

OPG holds significant ongoing concerns about the continued criminalisation of children in the child protection system, particularly those who are charged with residential care-based offences and those with significant mental health needs and behaviours which are resulting in a police response rather than a therapeutic mental health or disability support response. In OPG's experience, a significant proportion of children within youth detention have a range of prejudicial circumstances that impact on their behaviour.

Recommendation 9:

A change to the minimum age of criminal responsibility to include consideration of:

- the criminalisation of disability,
- the criminalisation of trauma, and
- The criminalisation of children in care.